Supreme Court, U.S.
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In The
Supreme Court Of The United States

October Term, 1997

ROBERT C. FLANAGAN,
Petitioner,

v.

JUDICIAL REVIEW COUNCIL OF CONNECTICUT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

On November 13, 1995, Ms. Penny Ross ("the complainant") filed a written complaint with the Connecticut Judicial Review Council ("the Council") describing a three and one-half year sexual relationship between the petitioner, a Superior Court judge, and the complainant, a court reporter assigned to his courtroom during most of that period. The complaint contained allegations of harassment and intimidation by the petitioner toward the complainant. *In Re Flanagan*, 240 Conn. 157, 161-62 (1997).[1/] On January 22, 1996, the Council notified the petitioner that it would hold a confidential probable cause hearing on February 16, 1996. The notice stated:

> The area of inquiry by the Council will be whether the conduct alleged in the complaint

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1/ The Judicial Review Council was established pursuant to Conn. Const. Art. V, § 7, implemented by Conn. Gen. Stat. §§ 51-51g, to investigate allegations of judicial misconduct and to impose discipline where warranted.

Connecticut's legislature has directed the Council to investigate "every written complaint" brought before it. Conn. Gen. Stat. § 51-51*l*(a). By statute, the Council must notify a respondent of the complaint and provide him a copy. *Id.* The Council then conducts an investigation to determine whether probable cause exists that "conduct under section 51-51i has occurred . . ." *Id.* At the investigatory stage, a respondent has the statutory right, if he chooses, to appear and be heard, and "to offer any information which may tend to clear him of probable cause to believe he is guilty of conduct under section 51-51i . . . ." *Id.* If the Council's "preliminary investigation indicates that probable cause exists that the judge . . . is guilty of conduct under section 51-51i the council shall hold a hearing concerning the conduct or complaint . . . ." to determine whether a violation has in fact occurred and if so, to issue sanctions. Conn. Gen. Stat. § 51-51*l*(c). At the public hearing, a respondent is given a full opportunity to appear and to respond to the charges. *Id.*

> occurred, and, if it did, whether such conduct violated Canons 1, 2A, or 2B of the Code of Judicial Conduct in violation of Section 51-51i(a) of the General Statutes.

Id. at 170.

At the probable cause hearing, the petitioner voluntarily appeared with counsel, cross-examined witnesses and presented evidence. Although he was not obligated to do so, the petitioner testified and admitted that he had a long-term consensual sexual relationship with the complainant while she was assigned to his courtroom as a court reporter. *Id.* at 171.

After completing this preliminary investigation, the Council issued its charges against the petitioner, alleging that over a period of several years he had had a consensual sexual relationship with a married court employee (the complainant), and that this conduct violated Canons 1 and 2A of the Code of Judicial Conduct and § 51-51i. *Id.* Specifically, these charges read:

> Charge 1
>
> Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to observe high standards of conduct so that the integrity and independence of the judiciary might be preserved, in violation of Canon 1 of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes.

Charge 2

> Between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, which conduct resulted in his failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A of the Code of Judicial Conduct and Section 51-51i(a)(2) of the Connecticut General Statutes. (Petitioner's App. 81)

The petitioner answered both charges in the same manner:

> The petitioner admits between March 1, 1992, and October 30, 1995, the Honorable Robert C. Flanagan engaged in a consensual sexual relationship with a married court employee, the complainant, Ms. Ross, but denies the remainder of the charge. (Petitioner's App. 82)

Pursuant to Conn. Gen. Stat. § 51-51(*l*)(c), the Council thereafter held a public hearing on the charges, took evidence and heard argument. By clear and convincing evidence, the Council found the following facts.

The petitioner, a Connecticut Superior Court Judge, and the complainant, a court reporter employed by the Judicial Department, engaged in a consensual sexual relationship from March 1992, to October, 1995. For substantial periods of time during this relationship, the complainant was consistently assigned as a court reporter to the petitioner's courtroom in G.A. 6 in New Haven. On many occasions the

complainant was present in the petitioner's chambers before the opening of court, during pretrial conferences with counsel present and during recesses. *In re Flanagan*, 240 Conn. 157, 164 (1997)

The Council found that the petitioner had engaged in this conduct "wilfully," and determined that his conduct violated Canons 1 and 2A of the Code of Judicial Ethics and Conn. Gen. Stat. § 51-51(i)(2). Therefore, by a vote of 9-3, the Council found the petitioner guilty of both charges. The Council then voted to issue him a public censure. *Id.*

He appealed directly to the Connecticut Supreme Court pursuant to Conn. Gen. Stat. § 51-51r and Connecticut Practice Book § 4150. In a strongly worded opinion by Chief Justice Robert J. Callahan, a unanimous Connecticut Supreme Court affirmed the Council's decision. *In Re Flanagan*, 240 Conn. 157 (1997).

The petitioner now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

The petitioner has raised no viable federal claim, and certainly none warranting this Court's review.

The petitioner seems to raise two issues. First, he claims that the Council, and then the Connecticut Supreme Court, sanctioned him for personal conduct. Second, he argues that the Court "changed" the charges against him from an allegation of a "non-wilful" to a "wilful" violation.

I. The Council Properly Held The Petitioner's Conduct To Violate The Canons Of Judicial Ethics.

Before both the Council and the Connecticut Supreme Court, the petitioner argued that his consensual sexual relationship with the complainant could not constitute a violation of either Canon 1 or Canon 2A[2/] of the Code of Judicial Conduct, or Conn. Gen. Stat. § 51-51i(a)(2), because it was a personal relationship. In this Court he persists in his contention that the Council sanctioned him for purely personal conduct.

The Connecticut Supreme Court specifically held, however:

> this was not purely personal conduct, because it took place with a person with whom [the petitioner] had an ongoing, daily professional relationship. Indeed, as the review council's findings indicate, [the complainant] not only served as the court reporter in [the petitioner's] courtroom, but "on many occasions [she] was present in [petitioner's] chambers before the opening of court, during pretrial conferences with counsel present and during recesses," occasions when one would not

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2/ Canon 1 of the Code of Judicial Conduct provides: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective."

Canon 2A provides: "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

> normally expect that the court reporter would be present. Thus, the risk of injury to public confidence in the integrity of the judiciary is substantially heightened in this instance as opposed to a case where the affair was with a person unconnected with his daily activities as a judge of the Superior Court.

Id. at 191. (emphasis supplied) The Court was therefore justified in holding:

> We are persuaded that a judge's three and one-half year affair with a married court reporter who regularly had been assigned to his courtroom is conduct properly prohibited by canons 1 and 2A because it reasonably could lead a knowledgeable observer to question the integrity of the judiciary and to lose confidence therein.

Id. at 189. This application of the facts to state-adopted statutes and judicial canons raises no federal issue.[3/] On the contrary, setting and enforcing standards of conduct for a state's judiciary is distinctly a function of the state itself. The Connecticut Supreme Court's interpretation is thus the ultimate authority on the issues presented here.

[3/] Therefore, the petitioner's discussion about the proposed commentary to Canon 2A that the Connecticut Superior Court judges failed to enact (Petitioner's Br. 9, 13) is both immaterial and irrelevant. It is immaterial because it does not address the issue raised in this case. It is irrelevant because the action the Superior Court judges took or did not take in enacting commentary to the Code did not bind the Council, which had an independent obligation to construe the Canons and the statutes.

II. The Council Properly Found The Petitioner's Conduct "Wilful," As Charged, And The Connecticut Supreme Court Did Not Alter That Charge or Finding.

The Council specifically found that the petitioner had engaged in the consensual sexual relationship wilfully. *Id.* at 164. The petitioner did not contest this factual finding below, but claimed that the finding did not support a "wilful violation of . . . any canon of judicial ethics," in violation of Conn. Gen. Stat. § 51-51i(a)(2). In this Court he now claims that the Connecticut Supreme Court "changed the charge" on him, finding him guilty of a non-wilful violation. Of course, that is not at all what happened.

Conn. Gen. Stat. § 51-51i(a) provides that "a judge shall be subject . . . to censure, suspension or removal from office for... (2) wilful violation of section 51-39a or any canon of judicial ethics." (emphasis supplied) The Council found that the petitioner had wilfully engaged in the sexual relationship with the complainant. *Id.* Based on this wilful conduct, the Council determined that he had violated Canons 1 and 2A and § 51-51i(a)(2). *Id.*

The petitioner argued to the Court below that to find him guilty of a "wilful violation," it had to find that he knew that his alleged conduct was forbidden under the Canons and that he acted with the specific intent to violate said Canons. The Connecticut Supreme Court rejected this interpretation as a matter "of statutory construction." *Id.* at 192. Recognizing that "[w]ilful" is a word "of many meanings, its construction often influenced by its context," the Court held that in "the context of the subsection of our judicial discipline statute that codifies the canons of the Code of Judicial Ethics, the term 'wilful' cannot reasonably be read to require a

specific intent to violate the canons given the necessarily broad and flexible nature of those canons." *Id.*, quoting *Screws v. United States*, 325 U.S. 91, 101, 65 S.Ct. 1031 (1945).

In fact, to have construed "a wilful violation of any canon" to require proof that the judge actually intended his conduct to violate that Canon would render the provision ineffective. Such proof would rarely, if ever, be available. The Court would not presume, therefore, that the legislature intended such an unreasonable interpretation. *Id.*

Thus, the Court concluded "that a judge is subject to discipline for a 'wilful violation of . . . any canon of judicial ethics' as long as he or she intends to engage in the conduct for which he or she is disciplined, whether or not he or she has the specific intent to violate the canon." *Id.* at 184.[4/] The Court did not, as the petitioner suggests, announce a new charge in its decision.

In the Matter of Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968), relied on heavily by the petitioner, does not hold to the contrary. In *Ruffalo*, the Ohio Board of Commissioners on Grievances and Discipline amended its charges *after* the adjudicatory hearing had already begun,

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[4/] It is certainly reasonable to charge all judges with constructive knowledge of the Code of Judicial Conduct. *In re Zoarski*, 227 Conn. 784, 791-92, 632 A.2d 1114 (1993). "By accepting his office, a judge undertakes to conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect." *Cincinnati Bar Ass'n v. Heitzler*, 32 Ohio St. 214, 291 N.E.2d 477, 482 (1972). "The judge must expect to be the subject of constant public scrutiny. The judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Code of Judicial Conduct, Canon 2, Commentary.

and not during a preliminary investigation.[5/] In this case, the Council properly conducted a preliminary investigation to determine if probable cause existed that the petitioner's conduct had violated the Code or Conn. Gen. Stat. § 51-51i. Having found probable cause, the Council properly charged the petitioner and notified him of the charges, which included an allegation of a "wilful" violation of the Canons. This charge and the Council's interpretation of the "wilfulness" element remained the same throughout all of the proceedings. The Court below merely adopted it.

5/ In *Ruffalo*, the petitioner was charged with twelve counts of misconduct. At the formal hearing on the charges, after the petitioner had testified, the Board amended its charges to add a new charge based only on the petitioner's and his associate's testimony. This Court therefore concluded that the petitioner had insufficient notice of the new charge prior to the formal proceedings because the Board amended the charge after the formal hearing had begun, and relied solely on the petitioner's testimony. *In the Matter of Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 1225-27 (1968).

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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